IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1891

LEWIS J. WEINSTOCK,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

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TO: THE UNITED STATES SUPREME COURT, October Term, 1975:

The Petitioner LEWIS J. WEINSTOCK prays that a Writ of Certiorari issue to review the judgment and order of the Supreme Court of

the State of California dated March 31, 1976, denying a hearing after affirmance of the Petitioner's conviction by the Court of Appeal of the State of California, Second Appellate District, which Opinion and Order was filed January 23, 1976.

This Petition raises a fundamental issue regarding the admissibility of previously illegally seized evidence in an entrapment case in direct contradiction to the dictates of Walder v. United States, 347 U.S. 62 (1954) and Agnello v. United States, 269 U.S. 20 (1925). The refusal of the Court of Appeal to follow these cases, and the misconstruction of the Court of Appeal in another portion of its opinion of the holding and import of Sherman v. United States, 356 U.S. 369 (1958) mandates that this Petition be granted.

OPINION BELOW

The California Supreme Court denied a hearing in the within matter on March 31, 1976 and notified Petitioner of such denial through mailing of a postcard. A copy of the postcard notice of denial is appended hereto as Appendix "A". The Court of Appeal of the State of California Second Appellate District, filed an Opinion in the within matter on January 23, 1976. A copy of the Opinion of the Court is appended hereto as Appendix "B".

JURISDICTION

The Judgment of the Court of Appeal of the State of California, Second Appellate District was entered January 23, 1976. The Court affirmed the conviction of LEWIS J. WEINSTOCK for violation of one count of California Health and Safety Code §11359, possession of marijuana for sale. A Petition for Hearing to the Supreme Court of the State of California was denied on March 31, 1976. The Court's jurisdiction is invoked pursuant to Title 28 United States Code §1257(3) and Rule 19.1(a).

QUESTIONS PRESENTED

1. Whether the Court of Appeal's ruling, which permits the introduction into evidence in any entrapment case evidence previously illegally seized is in direct and irreconcilable conflict with this Honorable Court's Opinions in Walder v. United States, 347 U.S. 62 (1954) and Agnello v. United States, 269 U.S. 20 (1925). The Court of Appeal of the State of California specifically permitted the introduction into evidence of contraband admittedly illegally seized on two prior ocassions based solely upon the fact that the Petitioner here asserted the defense of entrapment.

2. Whether the Court of Appeal of the State of California has completely misconstrued the import and holding of Sherman v. United States, 356 U.S. 369 (1958) by determining that the question of proof of entrapment as a matter of law does not exist in the present case based solely upon the fact that the requisite criminal intent existed at some point in the mind of the Defendant?

STATUTES INVOLVED

United States Constitution, Amendment IV, states:

> "The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the places to be searched, and the persons or things to be siezed."

Relevant portions of California Health and Safety Code §11359 are appended hereto as Appendix "C".

STATEMENT OF THE CASE

Information No. A-125987 was filed in the Superior Court of the State of California for the County of Los Angeles on October 18, 1973 and charged the Petitioner LEWIS J. WEINSTOCK in one count with a violation of California Health and Safety Code §11359, possession of marijuana for sale, alleged to have occurred on or about April 5, 1973. An amendment to the Information alleged a prior conviction of California Health and Safety Code §11530.5 in Los Angeles County Superior Court No. A-266689.

The Appellant's Motion to Dismiss pursuant to California Penal Code §995 was denied on January 29, 1974. Appellant's Motion to Suppress Evidence pursuant to California Penal Code §1538.5 was denied on March 19, 1974. The matter thereafter, on March 20, 1974 proceeded to jury trial before the Honorable Charles M. Hughes. The jury ultimately returned a verdict of guilty of violation of §11359, California Health and Safety Code, on April 5, 1974.

A timely Notice of Appeal was filed by the Petitioner.

The Petitioner was sentenced on June 7, 1974 to the term prescribed by law. The sentence was suspended and probation was granted for a period of five years. A condition of probation required the service of one year of

week-ends in the County jail.

Petitioner's conviction was affirmed by the Court of Appeal of the State of California, Second Appellate District, Division Five in an Opinion filed January 23, 1976. Petitioner's Petition for Hearing before the California Supreme Court was denied on March 31, 1976. The testimony at trial may be summarized as follows: R. G. Miller testified that in April, 1973, he was a Los Angeles Police officer attached to Administrative Narcotics. He testified that he had previous to that time reached an agreement with an informant named Azzaro, that Azzaro would cooperate as a middleman in marijuana purchases and would attempt to purchase marijuana from the Petitioner. Pursuant to this agreement, the informant was to tell the Petitioner that he knew someone who wanted to purchase several hundred pounds of marijuana. Miller testified to a conversation which allegedly took place on April 5, 1973 in which a marijuana transaction was arranged obstensibly for one hundred sixty pounds of contraband. He testified that he recognized the party to whom Azzaro was speaking as the Petitioner. The Petitioner later contacted Azzaro and stated that the marijuana had already been sold by his source and only one hundred pounds remained. Azzaro then told the Petitioner he would be willing to purchase that amount and would provide a rented vehicle in which to place the marijuana. A meeting was then arranged.

Victor Wanek testified that in April he also was assigned to Administrative Narcotics, Los Angeles Police Department. He rented an automobile for the purported transaction between Azzaro and the Petitioner, conducted a search of the automobile upon renting it and then placed $8000.00 in cash in the trunk. He thereafter gave the keys to Azzaro. Wanek surveilled Azzaro as he met with the Petitioner at a Hamburger Hamlet. Azzaro left that location and informed the officers that only forty pounds were available and that the sale was to be consummated at a different location. Azzaro drove to that location, and Wanek observed a second individual enter the rented vehicle and leave the area. He attempted to follow the vehicle but lost it in traffic. Approximately thirty minutes later the vehicle returned to the meeting area. The Petitioner was in the vehicle, and was contacted there by Azzaro. The Petitioner was then arrested and allegedly consented to a search of the vehicle. Wanek searched the trunk and discovered eighteen "bricks" of marijuana.

The testimony with regard to the surveillance of the Petitioner and Azzaro was corroborated by Joseph V. Amore, an Administrative Narcotics Officer.

Miller testified that after the arrest he engaged the Petitioner in conversation and the Petitioner stated that he had obtained the marijuana from a person he lived with who also allegedly sold cocaine.

A stipulation was entered that the items seized from the trunk of the automobile were in fact marijuana. The People thereafter rested.

A timely Motion pursuant to California penal Code §1118 was denied.

The defense recalled Sergeant Wanek to the stand. Wanek testified that Azzaro and his partner in a restaurant, Nicki Laurie were arrested for sales of marijuana in August, 1971. After the arrest Azzaro and Laurie agreed to set up narcotic deals for the officers in exchange for a favorable recommendation at sentencing. Wanek testified that the pair were hesitant to set up the Petitioner initially but that later, when their sentencing became imminent they agreed to do so. Wanek testified that with regard to the arrangements with the Petitioner, it was his suggestion that the car be left at the particular location with the keys for the Petitioner and that he himself had rented the car. He further testified that Azzaro and Laurie were told that they had to set up three to four major narcotics dealers in order to obtain a favorable recommendation and that prior to setting up the Petitioner they had only negotiated two transactions for the officers.

Over objection by the Petitioner, Wanek testified on cross-examination regarding a "pattern" of "large scale narcotic dealers." This pattern involves selling to persons the dealer knew personally, choice by the seller of the place of transaction, a last minute change in the place

of transaction. He further testified that in his opinion this case involved a large narcotics dealer and a person who is immediately below the wholesale/smuggler of narcotics.

The defense next called Dominic Azzaro who testified that he was arrested in August, 1971 on a sale of marijuana charge. He eventually received a sentence of one year in County Jail after cooperating with authorities. He testified that Wanek and Miller brought up the name of the Petitioner and suggested they were interested in setting up the Petitioner. He originally told Wanek and Miller that he did not wish to do so, but later changed his mind when his sentencing became imminent. He testified that he had discussions with the Petitioner regarding marijuana shortly after his arrest in 1971, in a tentative effort to determine if the Petitioner could be set up. The Petitioner indicated that he was not interested. His next conversation with the Petitioner occurred two weeks prior to the Petitioner's arrest. The Petitioner stated he did not know if he could get marijuana. Azzaro testified he called the Petitioner later that same day and again the next day. He next called the Petitioner on April 1, 1973, and again requested marijuana from the Petitioner. He told the Petitioner that he badly needed money with regard to his case. The Petitioner indicated he would try. Azzaro again called the Petitioner. The Petitioner said he was busy but that he would try. Azzaro contacted the Petitioner again on April 2. The next morning Azzaro once again contacted the Petitioner and was informed that

there was a chance he could obtain marijuana. On cross-examination, th District Attorney asked a series of questions regarding Azzaro's opinion of the Petitioner as a large scale narcotic dealer. These questions were objected to and eventually led to a Motion for mistrial.

Marshall Laurie testified that he knew the Petitioner for approximately five years and was introduced to the Petitioner by Azzaro. Laurie was arrested with Azzaro in 1971 on charge of possession for sale of marijuana. Laurie asked the Petitioner if he could obtain marijuana for him and testified that every one, two or three weeks he would again question the Petitioner to determine whether he could obtain marijuana. He testified he was attempting to set up the Petitioner in order to "work off his case." The Petitioner stated through 1971 that he was not selling marijuana and did not want to get involved. Laurie asked the Petitioner for narcotics ten to fifteen times in 1972 and the Petitioner said he could not obtain any. Laurie testified the Petitioner stated:

> "He couldn't get that quantity. He doesn't want to get involved. He doesn't sell, you know he wouldn't sell that kind of grass. Just negative."

Laurie testified that both Wanek and Miller had stated that if the pair set up WEINSTOCK they could get probation or at least no state prison term. Miller and Wanek stated the Petitioner was in the rock 'n roll business

and he could get marijuana if he wanted to. The Petitioner however again through January, February and March, 1973 stated he could not get marijuana.

Laurie testified that he never was provided marijuana by the Petitioner, that Petitioner never talked to him regarding large scale narcotics transactions, and that the only reason he felt he could obtain marijuana from the Petitioner was because he was in the music business. He testified that at one time he saw one half pound of marijuana in the Petitioner's house.

The Petitioner testified in his own behalf. He testified that his business was that of music producer and talent coordinator. He met Laurie and Azzaro in 1970. The pair owned a restaurant in Hollywood which was frequented by the Petitioner. He testified that the pair asked him for large quantities of marijuana continually after their arrest in 1971, and that the requests continued through 1972. He testified that Laurie stated he could really help him out by supplying cocaine or marijuana to him but that he had no dealings or intentions to deal in either 1971 or 1972. In February, 1973 Azzaro left his residence and had a "falling out" with Laurie and stated that he was hard pressed for money. The Petitioner testified that the request for marijuana became more intense. Azzaro stated that he needed the money to stay out of jail and in order to pay a good lawyer. He stated that the Petitioner would be doing him a favor to get narcotics. The Petitioner finally stated that he would look around. Four to five

days prior to his arrest, the Petitioner received numerous phone calls from Azzaro but he was still hesitant regarding obtaining marijuana for him. Azzaro then personally came to the Petitioner's house and said that he would be helping him out by getting him marijuana, and that the Petitioner's efforts would be getting Azzaro out of a jam. On April 2, the Petitioner received numerous phone calls from Azzaro but was still hesitant about getting involved. On April 3, the Petitioner spoke with Azzaro several times but still had nothing and was hesitant. He relayed information that he had spoken to an acquaintance who said that he had approximately thirty-six pounds of marijuana. On April 4 Azzaro called and said that the thirty-six pounds would be all right and indicated that he would furnish an automobile and the transaction should take place in a public place. He stated that he would give the Petitioner $10.00 per pound on the purchase. The Petitioner suggested that the transaction take place in the Topanga Canyon center inasmuch as this was close to the area where he was picking up the marijuana. His source of supply stated that he would follow the Petitioner to the shopping center. On April 5, Azzaro telephoned several times prior to the transaction. After his arrest, the Petitioner was told by Sergeant Wanek that he had been watching the Petitioner for two years and had previously unsuccessfully sent someone in to "get" the Petitioner.

On cross-examination of the Petitioner, over strenuous and repeated defense objections,

the District Attorney was permitted to inquire with regard to alleged prior narcotics activity of the Petitioner in 1970 and 1971, including questions regarding possession of large amounts of marijuana or cocaine during those years.

During the course of rebuttal, the prosecution presented evidence, apparently to impeach the Petitioner, with regard to the questions asked on cross-examination of the Petitioner. The proof dealt with two incidents involving narcotics transactions in which the Petitioner was allegedly involved. The first factual situation involved a prior arrest and prosecution of the Petitioner resulting from an entry into his home in 1970. These facts were originally charged as the prior offense alleged in the Information. The case was reversed upon appeal, on the grounds of illegal search and seizure in an Opinion originally published but later ordered not to be published by the California Supreme Court. The prosecution called Charles B. Myers who testified that he was an administrative narcotics officer in November, 1970. He proceeded to a location at 7101 1/2 Hillside in Hollywood. The Petitioner had previously testified he resided at that address during the months in question. Myers testified that on November 16, he sneaked over a neighbor's fence and climbed the back stairs to the rear door of the Petitioner's apartment. He listened at the door and heard a conversation involving "bricks." On November 19, 1970 he returned to the location with a search warrant, again climbed the back stairs and peeked through a small opening in a rear window

approximately one inch wide. He testified that upon entering pursuant to the warrant he discovered two kilos of marijuana, small amounts of marijuana debris, an ounce of cocaine and a small amount of hashish. A Mr. Genzmer was sitting at the Petitioner's kitchen table when the officers entered.

With regard to the second incident, the Petitioner had been charged but the charges were dismissed at the preliminary hearing as a result of a finding of illegal search and seizure. Jimmy Sakoda testified that he was a Los Angeles Police officer assigned to Administrative Narcotics in May, 1970 and proceeded to the Carlton Lodge Motel at 2011 North Highland Avenue in Hollywood. He conducted a surveillance of a Jaguar automobile in the parking lot together with Officer Haldi. He later entered a motel unit and saw the Petitioner in the room with two other persons. He chased one person to a back room and recovered $3500.00.

Richard Haldi testified that he participated in the surveillance of the motel on May 27, 1970. He observed a yellow Pontiac to arrive and park in a parking stall, and soon thereafter a Volkswagen parked behind the Pontiac. He observed the Petitioner to exit one vehicle, meet the driver of the Pontiac and proceed to a room in the motel. The two then returned in the company of another person and transferred some item from the Pontiac to the Volkswagen. A large box which had been removed from the trunk of the Pontiac was then brought to the motel room by the three. The officers effectuated entry into the motel room

by means of a pass key and discovered marijuana in the large box. The People introduced into evidence the marijuana discovered in the home, marijuana discovered in the later search of the Volkswagen, a manila envelope and a scale.

Testimony, which was given at the preliminary hearing, of a third officer who was not present was read to the jury.

The Petitioner testified in sur-rebuttal and stated that on November 17, 1970 two individuals were with him, a Ray Fragosea and Norma Tager. He testified that one pound of marijuana discovered under the refrigerator was his for his own personal use but the other contraband was not his. He had previously testified that on November 19, 1970 Genzmer had arrived at his residence with a large amount of marijuana but that he had no connection with that marijuana. A renewed motion pursuant to §1118.1 of the Penal Code was denied.

REASONS FOR GRANTING THE WRIT

1. The Petitioner, through his testimony at no time denied his involvement in the underlying transaction. Rather, he claimed that the activity of the informants established entrapment. The prosecutor, on cross-examination elicited responses

from the Petitioner with regard to prior unrelated possession of narcotics or involvement in narcotics transactions. These questions were objected to strenuously and prepeatedly based upon Fourth Amendment grounds, exceeding the scope of direct examination, immateriality, irrelevancy, staleness and in violation of the Fifth Amendment right against self incrimination. Thereafter, in rebuttal, the People introduced evidence of these prior activities, and physically introduced the evidence previously illegally seized.

The Court of Appeal, at Slip Opinion page 25, has interpreted the California Supreme Court's Opinion in People v. Taylor, 8 Cal. 3d 174 (1973) to permit the introduction of such testimony in evidence.

The situation confronted here is very similar to that previously confronted by this Court in Agnello v. United States, 269 U.S. 20 (1925). In that case, the Government attempted to introduce in its case in chief evidence seized in violation of the Fourth Amendment. The evidence was excluded. Thereafter, on cross-examination of the Defendant, the prosecutor was permitted to ask over objection "did you ever see narcotics before?" Agnello replied in the negative. The illegally seized evidence a can of cocaine discovered in Agnello's home, was produced and Agnello denied having ever seen it. In rebuttal, the prosecutor was permitted to introduce the previously excluded evidence. This Court reversed and noted:

> "[T]he contention that the evidence of the search and seizure was admissible in rebuttal was without merit. In his direct examination, Agnello was not asked and did not testify concerning the can of cocaine. In cross-examination, in answer to a question permitted over his objection, he said he had never seen it. He did nothing to waive his Constitutional protection or to justify cross-examination in respect of the evidence claimed to have been obtained by the search . . . The admission of the evidence obtained by the search and seizure was error and prejudicial. . . ."

In 1954, this Court considered again a similar issue in Walder v. United States, 347 U.S. 62. In that case, however, the defendant, in direct testimony stated "I have never sold any narcotics to anyone in my life." Over objection narcotics seized illegally from the defendant several months before were introduced into evidence in rebuttal. The evidence was limited to impeachment purposes. The Court, in distinguishing Agnello noted that the Defendant "went beyond a mere denial of complicity in the crimes in which he was charged and made the sweeping claim that he had never dealt in or possessed any narcotics."

The result which entails from the Court of Appeal's determination is to permit the State

of California to challenge a claim of illegal activity on behalf of its agents (through entrapment) and to do so by resort to evidence obtained through previous illegal activity (a search and seizure). The result is both incongruous, incredible, and in direct contradiction to Agnello and Walder.

This case does not involve perjury on the part of the Petitioner. The concerns expressed by this Court with regard to possible perjurious testimony do not exist. The Petitioner here has never engaged in perjury, but merely utilized the defense of entrapment. If the decision of the Court of Appeal is to prevail, illegally seized evidence may be used in any case in which entrapment is a defense. There would thus be a motivating force to obtain such evidence for later use which would itself involve the judiciary in participation in the illegal activity of the police.

This Court should take this opportunity to further explain the ramification of the Agnello-Walder doctrine and to deter the erosion of that doctrine merely because the Defendant has claimed entrapment.

2. The Court of Appeal refused to find entrapment as a matter of law based upon its conclusion that there was "substantial evidence" that the criminal intent originated in the mind of the accused. The only evidence referred to by the Court is the Petitioner's "own statement providing a motive for entering into the activity."

Slip Opinion page 27. However, the Court has overlooked the purpose of the entrapment rule. There is no doubt that intent at some point existed in the mind of the Petitioner to commit the crime. Any statement with regard to the Petitioner's attempt to obtain money merely indicates that at some point he fell prey to the actions of the police agents and formulated the requisite intent. Moreover, the statements relied upon were made by the Petitioner after his arrest, thereby clearly indicating that they relate only to the direct proof of intent required, not the issue of overcoming the entrapment defense.

The facts as analyzed by this Court in Sherman v. United States, supra, demonstrate the factual situation under which entrapment is established as a matter of law. The undisputed evidence of the prosecution's informants in the present case is remarkably, and in all material respects, similar to that upon which the Court relied in Sherman v. United States, supra.

The idea to "set up" the Petitioner arose with the officers. Seargeant Wanek himself testified that he discussed the Petitioner with Azzaro and Laurie in late 1971. Azzaro testified that the officer brought up names of individuals they were interested in arresting and that Petitioner's name was mentioned by the officers. The ultimate plan with regard to the purported sale arose with the officers. It was Sergeant Wanek's suggestion that a car be left at the particular location with the keys for the Petitioner, he suggested renting a car for the ocassion and

suggested that the Petitioner was in the rock 'n roll business and could obtain marijuana if he wanted to. In fact, the Petitioner had never provided Laurie with large amounts of marijuana prior to this occasion. The Petitioner had never even talked about large scale narcotics transactions.

The motivation of the informants was based upon their own arrest for sale of narcotics in 1971. They decided to set up the Petitioner, according to Wanek, because they were getting close to their sentencing and had not fulfilled "quotas" established by the officers. Wanek and Miller suggested that if they set up WEINSTOCK successfully they could get probation or at least no state prison term. In fact, Laurie and Azzaro were given probation on condition of spending one year in the County jail and Laurie's sentence was modified after six months service of week-ends. Obviously the situation is itself frought with danger when officers suggest "quotas", suggests persons who for their own reasons they want to have arrested, and force such arrests when sentencing of the informants is approaching. The necessity for the informants to set up someone, whether guilty or innocent, is apparent. In fact, Azzaro testified that he was under such pressure he considered planting evidence in the Petitioner's home and notifying the police.

The informants utilized inducements, appeals to friendship, repetitious requests, and appeals to sympathy in order to overcome the

Petitioner's reluctance. Azzaro testified he contacted the Petitioner shortly after his arrest to determine the possibility of setting up the Petitioner. The Petitioner said at that time that he couldn't get marijuana for sale and had nothing to do with it. He contacted the Petitioner two weeks prior to the eventual arrest, and made numerous phone calls and contacts attempting to procure marijuana. He attempted to induce the Petitioner by promises of money. He told the Petitioner he needed money badly for his own case and stated "you could be doing me a hell of a favor if you can get it for me."

Laurie, who with Azzaro had been friends with Petitioner for five years made similar attempts. Soon after his own arrest in 1971 he asked the Petitioner if he could obtain marijuana for him. He asked the Petitioner to obtain large amounts of marijuana every few weeks, whenever he saw the Petitioner. The Petitioner stated throughout 1971 that he wasn't selling marijuana. Laurie requested marijuana from the Petitioner approximately ten to fifteen times in 1972. The Petitioner stated he did not want to get involved and that he would not sell marijuana. Throughout January, February and March, 1973 the Petitioner refused to provide marijuana.

Thus, the prosecution informants presented unrebutted testimony that they attempted to solicit narcotics from the Petitioner for a period of approximately one and one half years. Throughout this time the Petitioner steadfastly maintained that he was unwilling to do so and was not involved

in narcotic trafficking. As their sentencing drew close, and they felt the pressure imposed by the officers, they took the suggestion of the officers with regard to setting up Petitioner and increased their efforts. Relying on friendship and inducements and repeated contacts with the Petitioner they eventually succeeded.

This case thus presents a factual situation even stronger than that considered in Sherman v. United States, supra. In this case unlike Sherman, the officers were not only the source of the intent in fact specifically directed their informants to prey upon the Petitioner. They authorized and encouraged repeated attemps to overcome the Petitioner's will. As stated by Justice Holmes in his dissent in Olmstead v. United States, 277 U.S. 438, 470 (1928):

> "It is less evil that some criminal should escape than that the Government should play an ignoble part."

CONCLUSION

It is consequently respectfully requested that this Court issue a Writ of Certiorari directed to the Court of Appeal of the State of California for the Second Appellate District.

DATED: June 24, 1976.

Respectfully submitted,

DONALD M. RE

and

GEORGE R. MILMAN

Attorneys for Petitioner

APPENDIX A

CLERK'S OFFICE, SUPREME COURT
4250 State Building

San Francisco, California 94102

MAR 31 1976

I have this day filed Order

HEARING DENIED

In re: 2 Crim. No 25698

People

vs.

Weinstock

Respectfully,

G. E. BISHEL
Clerk

APPENDIX B

NOT FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent	)	Court of Appeal Second Dist. FILED JAN 23 1975
v.	)	Clay Robbins, Jr. Clerk
LEWIS J. WEINSTOCK, Defendant and Appellant	)	Deputy Clerk
	)	2d Cr. No. 25698 S.C. No. A123987

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles M. Hughes, Judge. Affirmed.

George R. Milman and Donald M. Re, Re & Russell, for Defendant and Appellant.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney General, and Frederick R. Millar and Howard J. Schwab, Deputy Attorneys General, for Plaintiff and Respondent.

By information, defendant Lewis J. ~~Wei~~ Weinstock was charged with one count of possession of marijuana for sale (Health & Saf. Code, §11359.) An amendment to the information alleged a prior felony conviction under section 11530.5. Defendant pled not guilty and denied the prior. His 995 and 1538.5 motions were denied. Trial was by jury. Out of the presence of the jury, the prior was stricken.[1/] Defendant was found guilty as charged and was sentenced to state prison for the term prescribed by law. Sentence was suspended and probation was granted for a period of five years under certain terms and conditions, one of which was that defendant spend a year of weekends in county jail. Defendant appeals from the judgment of conviction.

Facts

Robert G. Miller testified that in April 1973 he was a Los Angeles police officer assigned to the administrative narcotics division and had made arrangements with an informant named Azzaro whereby Azzaro would cooperate to be the middle man in the purchase of a quantity of marijuana from appellant. Miller told Azzaro to find out if appellant had access to a quantity of marijuana and to tell appellant that he had a person who was interested in buying a couple of

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1/ Defendant's prior conviction was reversed on appeal. (See People v. Weinstock, 33 Cal. App. 3d 567, ordered by the Supreme Court on September 26, 1973 not to be published.)

hundred pounds of marijuana. On April 5, 1973, Miller listened in on a telephone converation that Azzaro had with someone named Lew. The voice of the person on the other end of the telephone was that of appellant. Azzaro informed appellant that "his man now had the money ready and was capable of purchasing the 160 pounds of marijuana." The price agreed upon was $80 a pound; the total amount of the purchase would be in the vicinity of $15,000. Appellant replied that he would have to recontact his "man" to find out if the "stuff" was still available. He told Azzaro that he would have to call him back. Azzaro replied that he was not at home and was moving around; he would call appellant back in approximately half an hour and asked him if he had contacted his "man." Appellant told Azzaro that his source did not have 160 pounds; he had to get rid of it the previous night because he had another buyer; there was only 100 pounds remaining for sale. Azzaro told appellant that he would be willing to purchase the 100 pounds; he would provide a rented vehicle in which to put the marijuana. Appellant instructed Azzaro to meet him at the Hamburger Hamlet restaurant at the corner of Ventura and Topanga Canyon Boulevards at 6:00 p.m. Miller testified that there was a further conversation at around 3:00 p.m. and that the price of $60 per pound was mentioned.

Officer Victor Wanek testified that he rented a 1973 Chevrolet for a purported transaction between Azzaro and defendant. He gave Azzaro the keys to the vehicle after placing $8,000 in the trunk. Wanek followed Azzaro to

the Hamburger Hamlet where Azzaro parked the vehicle. Azzaro then entered the restaurant; at some later time, he left the restaurant and drove across the street, where he met Wanek. Azzaro told him that the plans were changed. He had received a phone call from appellant while in the restaurant and was told there were only 40 pounds of marijuana available and that if he still wanted any the sale would have to be consummated at a different location. Defendant had told Azzaro to meet him at a fruit stand at the intersection of Old Topanga and Topanga Canyon Road.

Wanek followed Azzaro to the meeting place. He observed appellant get into the Chevrolet. They proceeded to leave the area. He attempted to follow them but lost the Chevrolet in traffic. Approximately 30 minutes later, the vehicle returned to the meeting place. Wanek walked up to the vehicle and informed appellant that he was "under investigation for possession and transportation of marijuana." He asked appellant to step out of the vehicle and asked if he could search the car. Appellant replied "Go ahead and search it. It is not my car." The trunk of the vehicle was opened with a key which was found in the ashtray, and a cardboard box was found to contain approximately 40 pounds of marijuana in brick form. Appellant was placed under arrest for transporting and possessing marijuana for sale.

At the police station, Officer Miller informed appellant of his constitutional rights.

Appellant told him: "To those questions that I want to answer, I will answer and if I don't want to answer it I won't answer it." Miller asked appellant whether there were any more narcotics or contraband at the location where he picked up the marijuana. Appellant replied, "No, nothing of any quantity," or "It might be personal stash at that location." Appellant gave the police officer the name of his supplier and where he was located. He stated that this individual "was a very large supplier of cocaine, that on occasion he did [sell or buy] pounds of cocaine and he was also a very large seller of marijuana, that he sold marijuana normally in 100 pound lots." He told Miller that he did not pay money for the marijuana; that this individual knew he had been arrested because "the person followed him down the hill and probably saw him get arrested. . ." He also made the following statement to the police officer: "I know I have been had. What can I do to help myself?" Miller asked appellant if he wanted to cooperate with the police; that if he did, the court would be made aware of the cooperation. Appellant replied that he would. He stated that he could be involved in a situation where he could assist the police in apprehending narcotics dealers. He knew an individual who was soon going to acquire 500 pounds of hashish.

Defense

Officer Wanek was called to testify on appellant's behalf, and discussed his relationship with the informants involved in this case.[2/] Azzaro and Lurie had been arrested in August 1971 "They work as partners. They own a restaurant in partnership and they were working their case off, so to speak, in partnership-type dual [sic] and it was almost impossible to get one away from the other." Appellant's name came up on conversations he had with them. They told him that they could probably set up appellant for some type of narcotics transaction. Wanek testified that they were reliable informants and had assisted the police in arresting "at least three major narcotics traffickers." He had discussed the punishment that they were facing and stated that they would eventually end up in state prison unless they "did something to help themselves." They were hesitant about setting up appellant because they didn't want to assist the police in arresting their friends. During the period from August 1971 and April 1973, on two separate occasions, Wanek discussed with the two informants the subject of setting up appellant. Lurie contacted Wanek in April 1973 relative to setting up appellant. Lurie told Wanek, "Well, I think I can talk Dom [Azzaro] into doing a deal with him."

On cross-examination, Wanek testified that with regard to large scale major narcotic

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2/ There were two informant, Azzaro and Lurie.

transactions there is a pattern that he observed during his experience as a narcotic officer relating to the requirements for successful transactions by a narcotic dealer. He has to safeguard himself against arrest, safebuard himself against robbery, and safeguard himself against carelessness. He will try to sell narcotics only to persons that he knows very closely or has a very close relationship with and that he knows are not police officers and are not informants.

The pattern is that the dealer will attempt to call the time and the place where he will sell the narcotics, and he will take certain precautions so he will not be arrested. In almost every large scale buy-bust type of situation, the police frequently find that at the very last moment when they are all set up in one place and are ready to make the arrest, the seller of the narcotics will make a very quick change to another location. The seller tries to protect himself against a possible robbery of his narcotics and against a possible arrest by the police. Almost invariably, one will find narcotics dealers using a public place, such as a parking lot, restaurant, or gas station where they have protection against being robbed, and against the police being set up and waiting for them. Based upon observations of the quantity of marijuana involved in this case, the level of dealing, in Wanek's opinion, would be classified at the level of "wholesale/smuggler."

Dominic Azzaro testified that he was reluctant to "set up" appellant because he was a personal friend. In 1971, after Azzaro's

arrest, Azzaro cooperated with the police and asked appellant to get him some marijuana. Appellant replied that he would have nothing to do with it; that he was too busy and involved in his business. Azzaro did not talk to appellant about obtaining marijuana between 1971 and the time he set up appellant in April 1973. Approximately 10 days prior to appellant's arrest, Azzaro was told by either Wanek or Miller that he (and Lurie) were short of their quota and that if "appellant could be turned [sic] that it would benefit us." Azzaro contacted appellant the next day about getting some marijuana. On April 1, 1973, he contacted appellant and told him that he had somebody from out of town who needed about 100 to 150 pounds of marijuana. Appellant replied that he "would check around and see, but he wasn't sure." Azzaro testified that it was his intent to set up appellant. On April 2, Azzaro contacted appellant again; appellant told him "that he was working on it and he was having a little difficulty." On April 3, appellant told him that there was a very good chance of getting some marijuana. The parties discussed the financial arrangement. Azzaro told appellant that he could make some money on the deal; appellant replied that he could use the money. The amount of profit for appellant was around $5 to $10 a pound. Azzaro told appellant that he would be doing him a favor if he obtained the marijuana for him.

Marshall Lurie testified that he and Azzaro owned a restaurant in Hollywood which was frequented by appellant. He had introduced appellant

to Azzaro. He had been arrested with Azzaro in 1971 and charged with the crime of possession of marijuana for sale. He testified that Officers Wanek and Miller had told them that if they could set up appellant they could get probation, or at least no state prison term. Lurie attempted to set up appellant in order to work his "case off." Lurie stated that he thought he could obtain marijuana from appellant because appellant was in the music business. Lurie repeatedly asked appellant to get marijuana for him. Appellant replied that he could not get any; "he was negative." On one occasion, he saw approximately one pound of marijuana at appellant's house.

Appellant testified that he had met Lurie and Azzaro at their restaurant. They had repeatedly asked him for quantities of marijuana after their arrest in 1971. "I would say a week didn't go by where I didn't hear from either one or both about some [sic] of securing something." He never intended to get any marijuana for them. During the three months prior to his arrest, Azzaro's requests for marijuana intensified. Azzaro told him that he needed the money to pay his attorney. He told appellant that he would be doing him a favor by getting him the marijuana. On April 1, he told appellant that he needed 100 pounds of marijuana. Appellant told Azzaro that he would "look around." The reason he changed his mind was that he had several bank loans which were either overdue or going to be overdue in a couple of days. Azzaro called him every couple of hours during the next couple of days prior to his arrest. Appellant stated that he

was hesitant and did not do anything as yet toward getting any marijuana. Azzaro stopped by his house and told him that he would be doing Azzaro a favor by getting him out of a jam; that all he had to do was to "introduce him to the People [suppliers]." On April 2, appellant spoke to his supplier, who informed him that he could probably get 36 pounds of marijuana. The next day (April 3), appellant relayed this information to Azzaro. On April 4, Azzaro called back and told appellant that 36 pounds would be sufficient and that he would furnish a vehicle to pick up the marijuana; that the transaction should take place in a public area. Azzaro told appellant that he would receive $10 per pound for his efforts. Appellant suggested that the transaction take place in Topanga Canyon Center since it was close to the area where he was going to pick up the marijuana. Appellant testified that he would not have engaged in the transaction but for the approaches and conversations with Azzaro and Lurie, and his financial pressures.

On cross-examination, appellant denied ever telling Lurie that he had dealt in large quantities of narcotics, including marijuana. Inquiry was also made into appellant's prior narcotics activity and a prior narcotics conviction in 1971. Appellant denied telling anyone that he could get some marijuana in brick form. He admitted unwrapping a kilo package of marijuana from a briefcase on November 19, 1970 which was brought over to his house by Jeffery Genzner. He admitted being arrested by the police on that date. He denied ever having

participated in setting up deals involving large quantities of marijuana; he admitted that the only marijuana deal he was involved in prior to the incident here in question was for his personal use only.

On re-direct, appellant testified that his prior conviction was reversed on appeal on the basis of an illegal search and seizure. He had told Genzner never to bring marijuana to his home at 7101-1/2 Hillside; Genzner never did until the night they were arrested.

Rebuttal

Officer Charles B. Myers testified that on November 16, 1970 he went to the landing at th the rear door of an apartment at 7101-1/2 Hillside Avenue, where appellant and another male had been observed entering. He heard a conversation emanating from the apartment; one male voice said, "Lew, can you get me some bricks?," and the other voice replied, "Sure. No problem." On November 19, 1970 Myers returned to the same location. He looked through a 1" opening in the rear window and observed appellant standing inside the kitchen. Another male was seated at the kitchen table. Appellant removed what appeared to be a kilo of marijuana from a briefcase, and started to unwrap it on the table. The officers knocked on the door. A voice replied, "Who is it?" The officers replied, "Police Officers. We have a search warrant

for the premises." They told the occupants to open the door. Myers heard footsteps running away from the door. He kicked the door open and entered. Appellant was caught as he was leaving the kitchen. There were 2 kilos of marijuana in a brief case on the floor; there was another kilo in the trash can; beneath the refrigerator there was a portion of a kilo of marijuana; on the table on the north end of the sink, there was a condom that had some white powder in it that appeared to be cocaine; there was also a jar which had some partially]smoked marijuana cigarettes. Utility bills at the location bore appellant's name. Appellant's voice appeared to be the same voice that had answered the questions directed to "Lew."

Officer Richard J. Haldi testified that he had participated in a narcotics investigation on March 27, 1970 at 2911 North Highland Avenue. He observed a Pontiac automobile pull up and park in a stall, and a Volkswagen pull in and park right behind the Pontiac. He observed appellant exit from the Volkswagen and meet the driver of the Pontiac. They then proceeded to one of the motel rooms. The two men returned with a third person and transferred some items from the trunk of the Pontiac to the trunk of the VW "that appeared to me to be - could have been bricks of marijuana." A large box which had been removed from the trunk of the Pontiac was brought back to the motel room. Appellant was found in the motel room, approximately 5 feet away from a quantity of marijuana which was

contained in the box.[2/] The box appeared to be the same one which earlier had been carried up to the room.

Surrebuttal

Appellant stated that Jeffery Genzner wanted to sell him some marijuana but that he did not want to buy any.

Appellant makes the following contentions: (1) The trial court erred in receiving evidence of appellant's prior criminal activity; (2) The court erred in admitting evidence of an illegal search and seizure; (3) The evidence established entrapment as a matter of law; and (4) The court erred in denying appellant's motion made pursuant to Penal Code section 1538.5.

Appellant first argues that the court erred in admitting evidence of appellant's prior criminal activity when he has relied on the defense of entrapment. Primarily, appellant urges that the court acted contrary to People v. Benford, 53 Cal.2d 1, 11, wherein the court stated:

"In California . . . evidence that defendant had previously committed similar crimes or had the reputation of being engaged in the commission of such crimes or was suspected by the police of criminal activities is not admissible on the issues of entrapment."

The Benford case, however, was decided prior to the enactment of Evidence Code section 1101(b) which "permits the People to adduce as circumstantial proof of the crime charged evidence encompassing the commission of a similar or related offense when the probative value of such evidence outweighs its prejudicial effect." (People v. Schader, 71 Cal.2d 761, 773.) In People v. Foster, 36 Cal.App.3d 594, it was stated that evidence of prior criminal activity was admissible as against the defense of entrapment. This conclusion was reached in Foster on the premise that Schader, relying on Evidence Code section 1101(b), "impliedly disapproved earlier cases such as People v. Benford . . . which applied a contrary rationale." (Id. at 599.)

A contrary conclusion is not required by Patty v. Board of Medical Examiners, 9 Cal.3d 356, relied on by appellant for the proposition that the Benford case, in all its particulars, remains the controlling rule. In Patty there was no issue raised as to the admissibility of any prior activities by Patty, and there was no indication that Patty had ever engaged in any activities similar to the charges involved there. However, Patty does stand for a reaffirmation of the basic premises which underlie the entrapment defense as stated in Benford, and which are not in dispute here. (See In re Foss, 10 Cal.3d 910.)

Appellant also relies on People v. Perez, 42 Cal.App.3d 760. In Perez the court stated

that "[i]f the defendant stipulates to [knowledge of the narcotic nature of the substance], it is error to admit evidence of other narcotics activity." (Id. at 766.) Although Perez established guidelines for limiting the extent to which previous criminal activity may be admitted, it recognized that such evidence may be admitted to establish such issues as motive, opportunity, or intent, provided that the court determines that the probative value of the evidence outweighs its inherent prejudicial effect. This is in accord with Foster, supra, in which it was held that evidence of prior criminal activity could be used to rebut the defense of entrapment if the trial court ascertained that the evidence:

"'. . . (a) "tends logically, naturally and by reasonable inference" to prove the issue upon which it is offered; (b) is offered upon an issue which will ultimately prove to be material to the People's case; and (c) is not merely cumulative with respect to other evidence which the People may use to prove the same issue. [d] In determining relevance, the trial court must look behind the label describing the kind of similarity or relation between the other offense and the charged offense; it must examine the precise elements of similarity between the offenses with respect to the issue for which the evidence is proffered and satisfy itself that each link of the chain of inference between the former and the later is reasonably strong. [e] In order to assess materiality, the court must consider not merely the elements of the offense, but also the defendant's testimonial admissions. . . ."

(People v. Foster, supra, 36 Cal.App.3d 594, 598-99, quoting from People v. Schader, supra, 71 Cal.2d 761, 775.)

Although recognizing the possible prejudicial effect of the evidence, we find no error by the trial court in its admission of such evidence for the purposes of rebutting the defense of entrapment.

Appellant next contends that the court erred in admitting testimony concerning illegally seized evidence from two prior narcotics activities. Appellant maintains that under People v. Taylor 8 Cal.3d 174, the introduction of this testimony was reversible error. In Taylor the court determined that the evidence of prior possession of narcotics, obtained by means of an illegal search and seizure, could be used for impeachment purposes only if the defendant, on direct examination, makes a sweeping claim that he has never possessed or dealt in narcotics.

In the instant case the People seek to justify the admission of the testimony on the authority of Taylor. Maintaining that Taylor sought to prevent a defendant from using illegal police activity as a sword to commit perjury in order to establish his defense, the People argue that appellant subjected himself to the impeaching testimony by testifying, on direct, that the intent to commit the crime charged did not originate with him, but rather with the police. We agree, and under the facts of this case, it is clear that the evidence showed that the intent

originated with appellant. Furthermore, appellant has not demonstrated that the testimony concerning the illegal search and seizure prejudiced the jury; the mere statement by appellant that the testimony did result in prejudice is not sufficient to reverse their judgment.

Appellant next argues that entrapment was established as a matter of law. We do not agree. It is clear that when the defense of entrapment is asserted by a defendant, the central issue is whether the defendant lacked the predisposition to commit the offense charged. Entrapment is not shown as a matter of law where there is substntial evidence that the criminal intent origingated in the mind of the accused. (People v. Terry, 44 Cal.2d 371; People v. Blackwell, 45 Cal.App.3d 804; People v. Ferguson, 261 Cal.App.2d 807.) Here there is substantial evidence from which it could be inferred that the criminal intent originated in the mind of appellant. There was testimony that would tend to show that appellant had engaged in the narcotic transaction without aid or inducement from the police based on his own statement providing a motive for entering into the activity. Thus we cannot say that entrapment was established as a matter of law.

Finally, appellant maintains that the superior court erred in denying his motion to suppress evidence made pursuant to Penal Code section 1538.5. Appellant's argument is two-fold: (1) there were not grounds to detain appellant; and (2) any consent to search given by

appellant did not extend to authorizing a search of the box containing the contraband. We find no merit in either contention.

First, although there is some question as to the reliability of the informants, it is clear that based upon Officer Wanek's personal observations, there was probable cause to stop and detain appellant. Wanek was present at the time the call was made to appellant, and he followed Azzaro to the Hamburger Hamlet keeping appellant within view, while the latter got into the vehicle and drove from the area. He also observed appellant return a short time later, as planned. Based upon these observations, and his personal knowledge of the events leading up to the events described, it cannot be said that Wanek did not have probable cause to stop the vehicle appellant was driving in order to make an investigation as to the possibility that he was carrying contraband.

Having once stopped appellant, Wanek asked if he coudl search the vehicle, and appellant responded "Yes, go right ahead. It's not my car." During the search of the car a key was found to the trunk. Appellant does not argue that his consent did not authorize a search of the trunk, but rather it did not authorize a search of the box. If Wanek could properly open the trunk, it would seem clear that tiven his knowledge of the facts and his expertise in dealing with narcotics cases, he had probable cause to open the box and seize its contents.

The judgment is affirmed.

NOT FOR PUBLICATION

STEPHENS, J.

I concur:

HASTINGS, J.

I concur in the result and in all of the court's reasoning, with this exception: The illegally obtained evidence was used not just for impeachment, but was admitted on the merits of the issue on entrapment.[1/] Defense counsel, however, never asked for a limiting instruction (See Witkin, California Evidence, Second Edition, §1295.)

KAUS, P.J.

1/ Although the direct examination of defendant was conducted with some care to avoid any "sweeping" denial of ever having been involved in the sale of narcotics, the effort was not quite successful. Defendant testified that the person from whom he obtained the marijuana involved in this case approached him in 1971 and suggested that defendant act as a sort of middleman between that seller and persons on defendant's staff or artists -- defendant was in the rock music business - "that were appearing and that wanted marijuana." Defendant supposedly replied that he "was too busy to be bothered with that sort of thing."

APPENDIX C

CALIFORNIA HEALTH AND SAFETY CODE

§11359: Possession for sale; punishment; prior convictions

(a) Every person who possesses for sale any marijuana, except as otherwise provided by law, shall be punished by imprisonment in the state prison for a period of not less than two years or more than 10 years and shall not be eligible for release upon completion of sentence or on parole or any other basis until he has been imprisoned for a period of not less than two years in the state prison.